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10 Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

18 JOSE JESUS MADRIGAL-DIAZ,

19 Defendant.

No. CR 07-0309 WHA

**JOINT SUBMISSION OF PROPOSED JURY  
INSTRUCTIONS AND PROPOSED SPECIAL  
VERDICT FORM**

Pre-Trial Conference Date: September 24, 2007  
Time: 2:00 p.m.

Trial Date: October 1, 2007  
Time: 7:30 a.m.

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22 Pursuant to the September 19, 2007 Order of the Court, the parties hereby submit the  
23 following Proposed Jury Instructions on substantive issues of law and Verdict Form.

24 The parties reserve the right to request such additional instructions as may become necessary  
25 from presentation of the evidence at trial or upon determination of the theory of the defense.

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Respectfully Submitted,

SCOTT N. SCHOOLS  
United States Attorney

DATED: September 21, 2007

/s/  
\_\_\_\_\_  
DENISE MARIE BARTON  
Assistant United States Attorney

DATED: September 21, 2007

/s/  
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JEFFRY M. GLENN  
Attorney for JOSE JESUS MADRIGAL-DIAZ

**STIPULATED INSTRUCTION NO. 1 RE**

**ALIEN – DEPORTED ALIEN FOUND IN UNITED STATES<sup>1/</sup>**

The defendant is charged in Count 1 of the Indictment with being an alien who, after deportation, was found in the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was deported from the United States;

Second, after deportation, the defendant voluntarily entered the United States;

Third, after the defendant entered the United States, he knew that he was in the United States and knowingly remained;

Fourth, the defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant was an alien at the time of the defendant's entry into the United States.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

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<sup>1/</sup> Ninth Circuit Model Criminal Jury Instruction, 9.5B Alien–Deported Alien Found in United States (8 U.S.C. § 1326(a)), (Modified 1/2007).

**Comment**

*See* Comment to Instruction 9.5 (Alien—Deported Alien Who Reenters United States Without Consent to Reapply for Admission) (inserted below)

In *United States v. Salazar-Gonzalez*, 458 F.3d 851, 856 (9th Cir. 2006), the court clarified "an area of confusion in our § 1326 jurisprudence" by holding "that for a defendant to be convicted of a Section 1326 'found in' offense, the government must prove beyond a reasonable doubt that he entered voluntarily and had knowledge he was committing the underlying act that made his conduct illegal – entering or remaining in the United States.

If the defendant raises the defense that he or she is a national, the court may wish to define the term "national" as: "[A] person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

**Comment to Instruction 9.5 (Alien—Deported Alien Who Reenters United States Without Consent to Reapply for Admission)**

The jury should be instructed that in order for a deported alien to be found guilty of illegal re-entry into the United States, the entry must be voluntary and knowing. See *United States v. Salazar-Gonzalez*, 458 F.3d 851, 856-58 (9th Cir. 2006) (clarifying "an area of confusion in our § 1326 jurisprudence"). Although *Salazar-Gonzalez* dealt with a prosecution for a deported alien "found in" the United States, the decision clearly applies to a case where the charge is illegal re-entry into the United States by a deported alien. See Instruction 9.5B (Alien—Deported Alien Found in United States).

"Section 1326 sets forth three separate offenses for a deported alien: to 'enter,' to 'attempt to enter,' and to be 'found in' the United States without permission." *United States v. Parga-Rosas*, 238 F.3d 1209, 1213 (9th Cir. 2001) (indictment charging "found in" United States, without reference to unlawful entry, was adequate on facts presented to charge violation of section 1326 for being found in the United States).

If the defendant raises the defense that he or she is a national, the court may wish to define the term national as: "[A] person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

This instruction was revised subsequent to the opinion in *United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005) (per curiam). It should be noted that although 8 U.S.C. § 1326(a) provides that the statute is violated by an alien who "enters, attempts to enter, or is at any time found in, the United States, unless . . . prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented" to the alien's reapplying for admission, it is common for the charging indictment in such prosecutions to refer to the lack of consent by the Secretary of the Department of Homeland Security.

"Because the lawfulness of the prior deportation is not an element of the offense under § 1326, [defendant is] not entitled to have the issue determined by a jury." *United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9th Cir. 1996) (en banc) (overruling *United States v. Ibarra*, 3 F.3d 1333, 1334 (9th Cir. 1993), cert. denied, 510 U.S. 1205 (1994)), cert. denied, 519 U.S. 1155 (1997). See also *United States v. Lara-Aceves*, 183 F.3d 1007, 1010 (9th Cir. 1999); *United States v. Medina*, 236 F.3d 1028 (9th Cir. 2001) ("With regard to the element of prior deportation, the government merely needs to prove that a deportation proceeding actually occurred with the end result of [the defendant] being deported," holding that a deportation order or warrant is sufficient to establish deportation and rejecting defendant's claim that the government was required to produce a tape recording or transcript as proof of prior deportation).

1 Although the crime of reentry of deported alien is a general intent crime, the crime of  
2 attempted reentry of deported alien requires proof of specific intent. *United States v. Gracidas-*  
*Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000) (en banc).

3 An alien has not reentered the United States for purposes of the crime of reentry of deported  
4 alien "until he or she is physically present in the country and free from official restraint." *Gracidas-*  
*Ulibarry*, 231 F.3d at 1191 n.3 (citing *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th  
5 Cir. 2000)). The reasoning of *Gracidas-Ulibarry* and *Pacheco-Medina* applies to prosecutions for  
6 being an alien found in the United States after deportation in violation of 8 U.S.C. 1326(a). *See*  
*United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000) (proof that border patrol encountered  
7 the defendant at the port of entry does not constitute adequate proof that the defendant was found in  
8 the United States free from official restraint). *See also United States v. Vela-Robles*, 397 F.3d 786,  
789 (9th Cir. 2005) (official restraint defense is not available where person triggers a seismic sensor,  
causing agents' response and capture).

9 In an appropriate case, the court might consider instructing the jury on the defense of constant  
official restraint as follows:

#### 10 THEORY OF DEFENSE

11 In this case when deciding whether the defendant is guilty or not guilty of  
12 the crime of being a deported alien found in the United States, the government  
13 must prove beyond a reasonable doubt that the defendant was not under constant  
official restraint when [he] [she] entered the United States. If the defendant was  
under constant official restraint, [he] [she] cannot be found guilty of being found  
in the United States.

14 "Under constant official restraint" means the defendant was under  
15 constant, continuous observation by a United States officer, or under constant,  
16 continuous camera surveillance, from the moment [he] [she] first crossed the  
border and entered the territory of the United States up until the time of [his] [her]  
17 apprehension. If the individual was first observed after [he] [she] had physically  
crossed the border of the United States, then [he] [she] is not under constant  
18 official restraint.  
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**PROPOSED INSTRUCTION NO. 2 RE VOLUNTARINESS**  
**OFFERED BY THE UNITED STATES**

You have heard that as an element of the crime of Illegal Reentry After Deportation, the government must prove beyond a reasonable doubt that the defendant voluntarily entered the United States.<sup>2/</sup> You may infer that the defendant voluntarily entered the United States if you determine that the government proved that the defendant was found at a location other than a border of the United States.<sup>3/</sup>

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<sup>2/</sup> Ninth Circuit Model Criminal Jury Instruction, 9.5B Alien - Deported Alien Found in the United States (8 U.S.C. § 1326(a)).

<sup>3/</sup> United States v. Bahena-Cardenas, 411 F.3d 1067, 1074 (9<sup>th</sup> Cir. 2005) (proving voluntariness of an aliens's entry from evidence of his presence in an area that does not share a border with Mexico is sufficient); United States v. Jimenez-Borja, 378 F3d 853, 858 (9<sup>th</sup> Cir. 2004) (when an alien is found well within the United States, away from the border, his entry and presence are presumed to be voluntary); United States v. Quintana-Torres, 224 F.3d 1157, 1158 (9<sup>th</sup> Cir. 2000) ("juror may well infer that the alien had the intention to be here when the alien is discovered at any location in the country other than the border").

**RESPONSE TO PROPOSED INSTRUCTION NO. 2 RE VOLUNTARINESS**

No instruction should be given. The defendant does not believe it is necessary.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, ) No. CR 07-0309 WHA  
Plaintiff, )  
v. )  
JOSE JESUS MADRIGAL-DIAZ, ) **VERDICT FORM**  
Defendant. )  
\_\_\_\_\_ )

We the Jury, find the defendant, JOSE JESUS MADRIGAL-DIAZ,

\_\_\_\_\_ GUILTY

\_\_\_\_\_ NOT GUILTY

of the crime of Illegal Reentry After Deportation in violation of Title 8, United States Code, Section 1326, as charged in Count I of the Indictment.

\_\_\_\_\_  
FOREPERSON

DATED: October \_\_\_, 2007